INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and Regulations involved	2
Statement	3
Argument	5
Conclusion	10

CITATIONS

Cases:

Americans United v. *Thrower*, 27 A.F.T.R. 2d 884	8
Bob Jones University v. *Connally*, 341 F. Supp. 277	7
Cammarano v. *United States*, 358 U.S. 498	8, 9
Christian Echoes Nat. Ministry, Inc. v. *United States*, 28 A.F.T.R. 2d 5934, appeal dismissed, 404 U.S. 561	6
Crenshaw County Private School Foundation v. *Connally*, 343 F. Supp. 495	8
Enochs v. *Williams Packing Co.*, 370 U.S. 1	6
Filipowicz v. *Rothensies*, 31 F. Supp. 716	6
Green v. *Connally*, 330 F. Supp. 1150, affirmed *per curiam sub nom. Coit* v. *Green*, 404 U.S. 997	6
Israelite House of David v. *Holden*, 14 F. 2d 701	8
Jolles Foundation v. *Moysey*, 250 F. 2d 166	8
Kyron Foundation, Inc. v. *Dunlap*, 110 F. Supp. 428	8
Louisiana v. *McAdoo*, 234 U.S. 627	7
McClintock-Trunkey Co. v. *Commissioner*, 19 T.C. 297, reversed, 217 F. 2d 329	9
McGlotten v. Connally, 338 F. Supp. 448	6, 7
Mitchell v. *Riddell*, 402 F. 2d 842, appeal dismissed and certiorari denied, 394 U.S. 456	8
Mosby Hotel Co. v. *Commissioner*, P-H Memo T.C., par. 54,288	9
National Council on the Facts of Overpopulation v. *Caplin*, 224 F. Supp. 313	8
Old Mission P. Cement Co. v. *Commissioner*, 69 F. 2d 676, affirmed, 293 U.S. 289	9
Penney Co., J.C. v. *United States Dept. of Treasury*, 319 F. Supp. 1023, affirmed, 439 F. 2d 63, certiorari denied, 404 U.S. 869	7

Cases (continued):

	Page
Revere Racing Assn. v. *Scanlon*, 232 F. 2d 816	9
Slee v. *Commissioner*, 42 F. 2d 184	8
Smith v. *Commissioner*, 3 T.C. 696	9
Tomlinson v. *Smith*, 128 F. 2d 808	6
Washburn v. *Commissioner*, 283 F. 2d 839	9

Statutes:

Internal Revenue Code of 1954 (26 U.S.C.):	
Sec. 170	9
Sec. 170(c)	4, 6
Sec. 162	9
Sec. 501	9
Sec. 501(c)	3, 4, 6, 8
Sec. 3101(a)	6
Sec. 3121(b)	6
Sec. 3121(k)	6
Sec. 7421	2, 5, 6, 8
Sec. 7421(a)	2
28 U.S.C.:	
Sec. 1346	3, 7
Sec. 1361	3, 7
Secs. 2201-2202	5
Sec. 2201	2
Sec. 2202	3

Miscellaneous:

Federal Rules of Civil Procedure, Rule 8(a)	7
Rev. Rul. 58-255, 1958-1 Cum. Bull. 91	9
S. Rep. No. 1005, 73d Cong., 2d Sess., p. 6	5
Treasury Regulations on Income Tax (26 C.F.R.):	
§ 1.501(c)(3)-1	2, 3, 4, 8
§ 1.170-1	4

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-545

LIBERTY AMENDMENT COMMITTEE OF THE U.S.A., a California corporation, PETITIONER

v.

UNITED STATES OF AMERICA, UNITED STATES TREASURY DEPARTMENT, INTERNAL REVENUE SERVICE, RANDOLPH W. THROWER (now JOHNNIE M. WALTERS), Commissioner of Internal Revenue of the United States; FRANK S. SCHMIDT, District Director of United States Internal Revenue Service, Los Angeles, California

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A, p. i) and the district court (Pet. App. B, pp. ii-vi) have not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1972. The petition for a writ of certiorari was filed on October 4, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(c).

QUESTIONS PRESENTED

1. Whether a mandamus suit by a nonprofit organization seeking to require the Treasury Department to reinstate rulings recognizing its tax-exempt status and its eligibility for tax deductible contributions is prohibited by Section 7421 of the Internal Revenue Code of 1954 and by the Declaratory Judgment Act.

2. Whether Section 1.501(c)(3)-(1)(c)(3) of the Treasury Regulations on Income Tax (1954 Code), which applies the statutory prohibition on lobbying by exempt educational organizations to organizations which promote constitutional amendments, is valid.

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

> SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.
>
> (a) [as amended by Sec. 110(c), Federal Tax Lien Act of 1966, P.L. 89-719, 80 Stat. 1125] *Tax.*—Except as provided in sections 6212 (a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.
>
> * * *

28 U.S.C.:

> § 2201. *Creation of remedy.*
>
> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any

court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2202. *Further relief.*

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

In addition, the pertinent portions of Section 501 (c)(3) and (4) of the Internal Revenue Code of 1954, Section 1.501(c)(3)-1(c)(3) of the Treasury Regulations on Income Tax (1954 Code), and 28 U.S.C., Sections 1346 and 1361, are set forth in the appendix to the petition.

STATEMENT

Petitioner is a nonprofit organization whose activities are directed toward the adoption of an amendment to the United States Constitution which would repeal the federal income, estate and gift taxes. Prior to and at the time of the filing of this suit, petitioner was exempt from income tax under Section 501(c)(4) of the Internal Revenue Code of 1954. (Pet. App. B, p. ii.)[1] Petitioner brought this mandamus action seeking

[1] Section 501(c)(4) applies to—

Civic leagues or organizations not organized for profit but

an order compelling the United States and Treasury officials to issue a ruling recognizing its tax-exempt status under Section 501(c)(3),[2] rather than Section 501(c)(4). Contributions to Section 501(c)(3) organizations are tax deductible by their donors under Section 170(c)(2)(B). An organization does not qualify as a Section 501(c)(3) organization—and hence donors are not entitled to tax deductions—if the organization is engaged in "carrying on propaganda, or otherwise attempting, to influence legislation". Section 1.501 (c)(3)-1(c)(3) of the Treasury Regulations on Income Tax (1954 Code) (Pet. App. C, p. x) defines "legislation" as including activities directed toward the adoption of a constitutional amendment.[3]

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operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

[2] Section 501(c)(3) applies to—

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

[3] This definition contained in Section 1.501(c)(3)-1(c)(3) is made applicable to Code Section 170(c)(2)(B) by Section 1.170-1(f)(2) of the Treasury Regulations.

The district court dismissed petitioner's mandamus action for lack of jurisdiction, holding that the suit in reality sought a declaratory judgment with respect to federal taxes which was barred by the prohibition in the Declaratory Judgment Act, 28 U.S.C. 2201-2202, *supra,* pp. 2-3. (Pet. App. B, pp. ii-iv.) The court of appeals, in a short *per curiam* order, affirmed the dismissal for "lack of subject matter jurisdiction." (Pet. App. A, p. i.)

ARGUMENT

The decision below is correct. There is no conflict among the courts of appeals or other reason for review.

1. Section 7421 of the Internal Revenue Code, *supra,* p. 2, prohibits, with exceptions not here relevant, any suit "for the purpose of restraining the assessment or collection of any tax." The Declaratory Judgment Act, *supra,* pp. 2-3, similarly prohibits declaratory judgment actions "with respect to Federal taxes." The legislative history of the latter statute indicates that the quoted language was designed to prohibit mandamus and injunctive relief in aid of a declaration of rights in a suit with respect to federal taxes. S. Rep. No. 1005, 73d Cong., 2d Sess., p. 6. The purpose of both statutes is to permit the United States to assess and collect taxes alleged to be due without judicial intervention. These statutory prohibitions may be circumvented only if it is shown (1) that "under no circumstances" can the Government prevail on the merits, and (2) that the taxpayer will sustain irreparable injury

for which there is no adequate remedy at law. *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 6-7.[4]

Faced with the burden of meeting both requirements, petitioner has satisfied neither. Petitioner has an adequate remedy at law for obtaining tax-exempt status under Section 501(c)(3) and eligibility for tax deductible contributions under Section 170(c)(2). It appears likely that petitioner may litigate these rights itself in a refund action to recover Social Security taxes, for which it would not be liable if it had a tax exemption ruling under Section 501(c)(3).[5] In any event the rights to those rulings may be litigated in a legal action by arranging for one of petitioner's benefactors to challenge, in a Tax Court or refund suit, the disallowance of his contribution as a deduction.

Nor is there a conflict, as petitioner asserts, between this case and the cases of *Green* v. *Connally*, 330 F. Supp. 1150 (D.C.D.C.), affirmed *per curiam* on the issue of denial of intervenor appeal *sub nom. Coit* v. *Green*, 404 U.S. 997, and *McGlotten* v. *Connally*, 338

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[4] Although *Williams Packing* dealt only with the Section 7421 prohibition, the courts have uniformly held that a declaratory judgment action with respect to federal taxes is barred to the same extent that a tax injunctive suit is precluded under Section 7421. *Tomlinson* v. *Smith*, 128 F. 2d 808, 811 (C.A. 7); *Filipowicz* v. *Rothensies*, 31 F. Supp. 716 (E.D. Pa.); *McGlotten* v. *Connally*, 338 F. Supp. 448, 453-454 (D.C.D.C.).

[5] Taxpayers exempt under 501(c)(3) are exempt from Social Security taxes, unless they elect to pay the tax pursuant to Section 3121(k)(1)(A), while those exempt under 501(c)(4) are not exempt from Social Security taxes (Sections 3101(a), 3121(b)(8)(B)). Cf. *Christian Echoes Nat. Ministry, Inc.* v. *United States*, 28 A.F.T.R. 2d 5934 (N.D. Okla.), appeal dismissed on jurisdictional grounds, 404 U.S. 561, where a similar procedure was used.

F. Supp. 448 (D.C.D.C.).[6] Those cases involved class actions by black persons seeking to require the Treasury Department to change its rulings with respect to *other* taxpayers so as to raise the amount of taxes collected from them. While we do not believe injunctions or declaratory judgments were proper in those circumstances,[7] the situation here is substantially different since petitioner seeks reinstatement of its own favorable tax rulings, and, unlike the non-taxpayer complainants in those cases, has an adequate remedy at law.

It is true that the instant decision is capable of a construction that conflicts with the views about the applicability of the Declaratory Judgment Act prohibition expressed by the district court in *Bob Jones University* v. *Connally*, 341 F. Supp. 277 (S. Car.).[8] But the *Bob Jones University* case is presently on appeal

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[6] The *McGlotten* opinion was issued in response to the government's motion to dismiss. No judgment has been entered, and the case is pending in the district court awaiting completion of discovery.

[7] See, *e.g.*, *Louisiana* v. *McAdoo*, 234 U.S. 627.

[8] It is not clear whether the court of appeals below meant to affirm the holding of the district court with respect to the application of the Declaratory Judgment Act prohibition, or whether its holding was that petitioner had failed to allege in its Complaint the statutory basis for the district court's jurisdiction, as required by Rule 8(a) of the Federal Rules of Civil Procedure. Jurisdiction is not granted by 28 U.S.C. 1346, since this is not a suit for refund of taxes paid. The lower court's jurisdiction is not supported by 28 U.S.C. 1361, since that statute is not an independent grant of jurisdiction to the district courts. *J.C. Penney Co.* v. *United States Dept. of Treasury*, 319 F. Supp. 1023, 1030 (S.D.N.Y.), affirmed, 439 F. 2d 63 (C.A. 2), certiorari denied, 404 U.S. 869. These were the only jurisdictional statutes cited in the Complaint.

(to the Fourth Circuit), as are other cases involving the same jurisdictional issue where relief was denied and suits were dismissed. *Americans United* v. *Thrower*, 27 A.F.T.R. 2d 884 (D.C.D.C.), on appeal (C.A. D.C.), and *Crenshaw County Private School Foundation* v. *Connally*, 343 F. Supp. 495 (M.D. Ala.), on appeal (C.A. 5). If these cases are decided in the government's favor on appeal, there will be no appellate conflict with respect to the interpretation of Section 7421 and the Declaratory Judgment Act. Consequently, review by this Court of the instant case would be premature and unwarranted.*

2. In any event, there is no merit to petitioner's contention that Section 1.501(c)(3)-1(c)(3) of the Treasury Regulations, which defines "legislation" as used in Section 501(c)(3) to include activities in support of a constitutional amendment, is invalid. On the contrary, this Court considered the Regulation in *Cammarano* v. *United States*, 358 U.S. 498, 512, and, quoting with approval language from *Slee* v. *Commissioner*, 42 F. 2d 184, 185 (C.A. 2), agreed that it makes "explicit the conclusion * * * that 'political agitation as such is outside the statute, however innocent the aim. . . . Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them.'" Activities in support of a constitutional

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* The same issue was also decided favorably to the government in *Jolles Foundation* v. *Moyscy*, 250 F. 2d 166 (C.A. 2); *Mitchell* v. *Riddell*, 402 F. 2d 842 (C.A. 9), appeal dismissed and certiorari denied, 394 U.S. 456; *National Council on the Facts of Overpopulation* v. *Caplin*, 224 F. Supp. 313 (D.C.D.C.); *Kyron Foundation, Inc.* v. *Dunlap*, 110 F. Supp. 428 (D.C.D.C.); *Israelite House of David* v. *Holden*, 14 F. 2d 701 (W.D. Mich.).

amendment are no less political than those in support of legislation; under *Cammarano*, agitation for legislative and constitutional changes should be treated identically for tax purposes.

The issue in *Cammarano* was whether activities in support of an initiative fell within the lobbying proscriptions of predecessors to Sections 162, 170 and 501 of the 1954 Code. Other cases considering the same or similar questions have uniformly concluded that activities directed toward constitutional amendments, initiatives and referendums fall within the term "legislation" as it is used in the Code. See *Mosby Hotel Co.* v. *Commissioner*, P-H Memo T.C., par. 54,288 (constitutional amendment); *Old Mission P. Cement Co.* v. *Commissioner*, 69 F. 2d 676 (C.A. 9), affirmed on other issues, 293 U.S. 289 (referendum); *Revere Racing Assn.* v. *Scanlon*, 232 F. 2d 816 (C.A. 1); *Washburn* v. *Commissioner*, 283 F. 2d 839 (C.A. 8) (referendum); *McClintock-Trunkey Co.* v. *Commissioner*, 19 T.C. 297, reversed on other issues, 217 F. 2d 329 (C.A. 9) (initiative).[10]

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[10] Petitioner is not helped by *Smith* v. *Commissioner*, 3 T.C. 696. There the Tax Court first held that a constitutional amendment was not legislation. For a short while, the Commissioner acquiesced in that decision. The Tax Court thereafter changed its position in *Mosby Hotel Co.* v. *Commissioner*, *supra*, and the Commissioner withdrew his acquiescence. Rev. Rul. 58-255, 1958-1 Cum. Bull. 91. See, also, *Cammarano* v. *United States*, *supra*, p. 507, fn. 10.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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